

Men of law in pre-Reformation Scotland

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John Finlay, *Men of Law in Pre-Reformation Scotland*, Scottish Historical Review Monograph no. 9, Tuckwell Press, East Linton 2000, x + 253 p., ISBN 1-86232-165-5

The central theme of John Finlay's research is the legal profession in the northern part of the British Isles during the reign of James V (1513-1542). This period is important, since it witnessed the establishment of a supreme civil court in Scotland in May 1532 as a 'college of justice'; a court which emerged from the King's Council and continues to this day as the 'Court of Session' (the members of these different judicial bodies were invariably referred to as 'lords of council and session'). Dr. Finlay specifically concentrates on the advocates who were admitted to the college of justice at the time of its establishment. The author has chosen these advocates because they are the first lawyers unambiguously connected with a particular court in Scotland whose names are known and whose careers may be studied in reasonable detail. In order to be able to assess continuity and change, the current study also discusses the period preceding the foundation of the college of justice. Dr. Finlay's efforts have resulted in a highly interesting and very readable book, which contains even more than the title suggests: it also includes detailed information on procedure. *Men of Law in Pre-Reformation Scotland* is additional proof of the thesis that 16th century Scotland was thoroughly part and parcel of the legal tradition of mainland Europe.

Although also consulting other sources, the author concentrates systematically on the *acta* of the lords of council. The *acta* are, first of all, a valuable source of information on procedure, since they cover the procedural steps undertaken in the resolution of disputes. Apart from that, they contain information on the most active legal counsel, on their clients and the type of lawsuits in which they were involved. The main body of (unpublished) *acta* used for the purpose of this study covers the period 1504 to 1537. From the information given by the author, it seems that they can be compared to the records of many of the superior courts of justice of mainland Europe, for example the *Parlement de Paris* in France or the *Grand Conseil de Malines* in the Low Countries.

The book commences with the question whether or not there was a legal profession in Scotland during the reign of James V. Answering this question requires a definition of 'professional lawyer' and for this reason the author discusses the definitions offered by Paul Brand and Robert Palmer. Brand argues that a person qualifies as a professional lawyer when (a) he is recognised by others as having particular knowledge or expertise in relation to the law; (b) he is willing to put that expertise at the disposal of others, receiving payment in return, and (c) this activity takes up a major part of his time. Palmer adds that to qualify as a professional lawyer (d) the greater part of a person's income must be derived from his legal activities and that (e) these must be continued over a number of years. Even though it is difficult to determine whether particular lawyers were paid for their services, Dr. Finlay claims that a significant number of men would potentially qualify as professional lawyers already before 1532, at least according to the test offered by Paul Brand. Additionally, he is convinced that the eight advocates ('general procurators') admitted to the new college of justice in 1532 undoubtedly met this test.

Claiming that there were professional lawyers in the period studied does not, however, necessarily entail that there also existed a legal profession. In order to determine whether this was the case one has to find out whether the identified professional lawyers were made subject to regulation, including a limit on their numbers in a particular court, or minimum standards of competence or behaviour. It is shown that these criteria were met in 1532. This does, however, not mean that a legal profession was absent before that time. There are indications that rules on, for example, limits to the number of lawyers admitted existed earlier. There is no evidence of pre-1500 rules and therefore Dr. Finlay situates the birth of the Scottish legal profession somewhere in the period 1500-1532. At the same time, however, the author claims that even though there was not a profession, professional men of law can be found before 1500.

The 'men of law' figuring in Dr. Finlay's study were referred to by different names. The author notes that in early sixteenth century Scotland lawyers were described as forespeakers, procurators, advocates and assessors. A single person could act in any of these capacities.

The exact content of the capacities changed over time. It seems that a man of law acted as 'forespeaker' when he appeared in court in the presence of his client, allowing the client to intervene whenever he disagreed with his representative. Therefore, the final responsibility for what was said lay with the principal. As a result one finds the presence of forespeakers not systematically recorded in the *acta*. All that mattered was the presence of the principal. The situation was completely different as regards procurators (or writers to the signet). The presence and names of these representatives were systematically recorded because, in court, the procurator was 'the master of the message'. According to Dr. Finlay, the clients of the Scottish procurator were not present in court to contradict or disavow him.

As regards the term 'advocate', the Scottish story is different from that of mainland Europe and roman-canon law. In Scotland, the term 'advocate' could cover men of law acting in their capacity of either forespeaker or procurator. Originally, however, the term 'advocate' seems to have had a rather precise meaning, being reserved for the King's representative in court. Finally, the author claims that the term 'assessor' was used in Scotland when 'a lawyer was called upon to advise laymen, operating in a judicial or administrative capacity, of the legal implications involved in the pursuit of their function.' (p. 19)

In Chapter 2, dedicated to the relation between lawyer and client, the author discusses, amongst other things, the constitution of a lawyer by his client. In the period researched the constitution of a procurator could either be proven by way of authentic letters of procuratory or by way of an extract from the books of the council narrating this constitution. According to Dr. Finlay, there is no evidence to suggest that there was a distinction between procurators *ad lites* and procurators *de negotia* as occurred, for example, in the Low Countries (in this respect the author refers to the *Practijke Civile* of the Flemish lawyer Philips Wielant, whom he mistakingly terms a 'Dutchman' on p. 27). Nevertheless, he suggests that the distinction may be used by modern observers for reasons of clarity, at least if applied with due care. In the sources, however, we do meet another distinction familiar to continental legal historians, i.e. the distinction between procurators receiving a general constitution to act in all future cases of a particular client or a special constitution, empowering them only to act in a specific case. Dr. Finlay also

found constitutions of a mixed nature giving procurators general powers whereas at the same time mentioning a specific case.

The second Chapter also deals with payments to men of law. The Scottish lords of council in the period under consideration did not produce an official scale of remuneration, as can be found at other courts of this period (e.g. the *Grand Conseil de Malines*). Neither do the records allow an assessment of what clients were paying for nor an accurate estimate of the wealth of the men of law.

Chapters 3 and 4 discuss the ‘advocatis and procuratouris’ admitted at the newly founded college of justice in 1532 in detail. Although generally speaking the statutes of the college seem to have been sanctioning a pre-existing *status quo*, there might have been some novelty according to the primary statute relating to the men of law who were allowed to appear before the college. This statute created the office of ‘general procurator of the council’ and limited their number to ten (originally, only eight were appointed; a list of the general procurators of the college during the period 1532-1549 can be found in Appendix 1 on p. 229). However, even in this respect the change may have been less of an innovation than it appears at first sight. Dr. Finlay suggests that before the foundation of the college of justice, the King’s judicial council may also have counted ten procurators of the court (p. 69).

It is difficult to understand precisely the content of the status of a general procurator of the council. Not having this status did not prevent other procurators from appearing before the college of justice, although less frequently than the general procurators. Originally general procurators seem not to have been privileged. However, in 1537 they acquired a concession permitting their summonses to be placed in the so-called ‘privileged table’, i.e. in a special section of the court calendar (on the ‘summons tables’ see also p. 98ff). As regards their duties, even before the foundation of the college of justice procurators of the court were required to act as counsel unless they had a reasonable excuse not to do so, the reasonableness of their excuse being determined by court. It was the task of the court to provide someone with an advocate if this appeared difficult for the litigant himself (for example, if he was to litigate against an influential opponent whom the procurators would rather not oppose in legal proceedings). In order to make sure that all litigants could actually procure the help of a procurator, a second rule had been created before the foundation of the college which established that no advocate could see a party’s summons, or the evidence which he intended to use in a case, unless he first agreed to accept the case and to act for that party. Apparently it was feared that advocates knowing the merits of particular cases would refuse dealing with them. Additionally, in order to secure representation for poor litigants the office of advocate for the poor was created in March 1535.

Chapter 5 is devoted to the court building (the tolbooth next to Saint Giles in Edinburgh) and procedure before the lords of session. The procedure had a distinct romano-canonical outlook. However, at the same time it can be claimed that the procedure ‘increasingly came to represent an independent body of rules in much the same way as has been argued in relation to the courts of the Low Countries that distinctive features emerged making the manner of litigation more or less unique.’ (p. 89). One of these unique features may have been found in the area of exceptions (p. 106). It was decreed that after a first exception had been rejected by the court, all further exceptions had to be made together at one time. As far as I know, one does not find the rule

formulated in this way at the courts of mainland Europe. It may, however, have been a good tool to abbreviate the length of the procedure.

Chapter 6 contains biographical details of two general procurators of the council, Robert Leslie and Robert Galbraith. It focuses especially on the legal career of these individuals, comparing the group of clients to whom they catered. It becomes clear that general procurators not only served their clients by representing them in court. They also served as arbitrators or as notaries, understandably so since the court sat only for approximately 100 days *per annum*. (As a side remark to this instructive Chapter may serve that in my opinion, the opponent of one foreign client of Robert Galbraith, the 'ducheman' Hans Grail, whom Dr. Finlay considers to be either Dutch or German (see p. 63), must have been German (if a name is a faithful guide)).

Chapters 7 and 8 deal with the King's Advocate. The origin of this office lies in the early part of the reign of James IV. Originally the King's Advocate was not fully occupied with representing the King, but also served ordinary clients. His position was, however, a special one, since at a certain moment in time he became *ex officio* a lord of council (the precise date on which this occurred is not known; the earliest evidence dates from 1531). He had the right to be present at the deliberations of the court. Consequently, it seems that his position, at least to a certain extent, can be compared to the position of the Procurator-General in France, who also represented the King in legal actions and who also was a member of the court having the right to be present during the court's deliberations. The similarity becomes even more apparent where Dr. Finlay discusses the type of cases in which the King's Advocate was involved: the defence and vindication of the King's economic rights (the 'royal demesne'); the defence of royal authority (criminal matters including so-called remissions) and the oversight of the administration of justice.

Chapter 8 contains biographical information on the various King's Advocates in the period 1493-1561. The names of the individuals fulfilling this position during the period 1493-1582 can be found in Appendix 2 on p. 230.

Dr. Finlay's study shows that the 16th century development of Scotland's highest court is in line with the development of similar courts on mainland Europe. The author's awareness of this is shown by the many comparative remarks included in his study. But even where he does make such remarks, any legal historian familiar with this particular subject will note that Scottish developments fit in a truly European framework. Dr. Finlay's pioneering study may well be called a valuable contribution to our knowledge of the history of courts, men of law and procedure in Europe.

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